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IN THE

Supreme Court of the United States

OCTOBER TERM, 1940.

No. 337

HERMANN MAX SCHWINN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

To the Honorable Charles Evans Hughes, Chief Justice of the United States, and to the Associate Justices of the Supreme Court of the United States:

Your petitioner, Herman Max Schwinn, respectfully petitions the Supreme Court of the United States for its order granting a writ of certiorari to review the action filed in the District Court of the United States, Southern District of California, Central Division, filed on the 17th day of December, 1938, wherein the United States of America was the plaintiff and Hermann Max Schwinn was the defendant and which action was No. Civil 159-RJ, and which was appealed to the Circuit Court of Appeals for the Ninth Circuit and which was entitled *Hermann Max Schwinn, Appellant, v. United States of America, Appellee,* and which action was No. 9371 in the Circuit Court of Appeals for the Ninth Circuit and pursuant to the rules of the Supreme Court your petitioner alleges as follows:

I.

Summary or Statement of the Matter Involved Herein.

This is a petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit from the Supreme Court of the United States in an action involving the cancellation of a certificate of citizenship.

The facts in this case are not intricate. There is little dispute between the parties as to the facts. In reality, the stipulation as to certain facts covers all of the essential facts necessary to a complete determination of this proceeding.

The petitioner was a native of Germany, having arrived in the United States on December 26, 1924, and resided from that time to April 30, 1927, in the State of Ohio. At that date the petitioner left Ohio for the west coast and settled definitely in Los Angeles, California, on September 1, 1927. The petitioner, on April 31, 1932, filed his petition for citizenship and had the same subscribed by two witnesses, Gerhard Foerstel and George E. Martens, who alleged that they personally knew the petitioner for five years continuously prior to that time and knew he had resided in the United States for five years continuously immediately prior to April 12, 1932, and that during all such period the petitioner had been a person of good moral character, attached to the principles of the Constitution and well disposed to the good order and happiness of the United States and, in the opinion of such witnesses, quali-

fied in every way to be admitted as a citizen. The hearing was had on that petition for citizenship on July 22, 1932, and the petitioner was admitted to citizenship on that day.

In fact, these two subscribing witnesses, at the time they subscribed to the petition for citizenship of this petitioner and at the time the petitioner's certificate of naturalization was granted, had known this petitioner six or seven months short of the full five-year period.

The petitioner and each of the two witnesses who filed their affidavits and testified for the petitioner, however, actually believed, when so testifying, that each of the witnesses had known the petitioner to have resided in the County of Los Angeles, State of California, for five years preceding the time of the giving of such testimony.

On April 13, 1932, and on July 22, 1932, when the petitioner filed his petition for citizenship and when his certificate of naturalization was granted to him there were actually residing in Los Angeles, California, witnesses who had known the petitioner for the full five-year period. These witnesses were actually available to this petitioner in addition to the witnesses mentioned in the stipulation as to certain facts signed by counsel for the parties to the above entitled action.

There had never been any dispute as to the actual fact itself that this petitioner on April 13, 1932, at the time he filed his petition for citizenship had actually been a resident of and within the continental boundaries of the United States for more than five years immediately prior to the date he filed his petition for citizenship.

The only question in dispute is whether or not a certificate of naturalization will be cancelled where all of the prescribed qualifications for citizenship in fact are present and where the applicant and his two witnesses made an unintentional mistake as to the actual length of time that they have known each other, being a matter of but a few months, where the actual facts themselves are in existence, and in all particulars the applicant was qualified to become a citizen in fact.

The complaint of the Government is based throughout and entirely upon the theory that the certificate was illegally procured and not upon the theory that it was procured through fraud.

There is one case in the United States and only one case in the United States that either your petitioner or the respondents have been able to find that is squarely in point. That is the case of *U. S. v. Rose,* 166 Fed. 999. This case is squarely in point, on all fours, with the instant case and the authority of this case clearly indicates that there has been alleged no cause of action for relief against your petitioner.

II.

Statement Indicating the Basis of Jurisdiction to Review Including the Statutory Provisions and the Date of the Entry of the Decree Together With the Date of the Petition and Appeal.

This is an action brought by the United States Government as plaintiff to cancel the certificate of naturalization of the defendant petitioner under Section 405 of Title 8 of U. S. C. A. on the grounds and the theory that the defendant and petitioner procured the same fraudulently and illegally.

The defendant and petitioner is a resident of the County of Los Angeles, State of California, and the complaint was filed by the Government on December 17, 1938, and the answer of the appellant was filed thereto on March 4, 1939. The trial was had on June 22, 1939, and judgment and final decree was entered against the appellant on July 15, 1939.

The United States District Court, Southern District of California, had jurisdiction of this suit by reason of the provisions of Section 405 of Title 8 of U. S. C. A. and by reason of the Judicial Code.

Notice of appeal was filed by appellant on October 11, 1939. Stipulation designating the record on appeal was served and filed on October 17, 1939. The record on appeal was filed in the office of the clerk of the United States Circuit Court of Appeals for the Ninth Circuit on November 20, 1939.

The United States Supreme Court has jurisdiction to entertain a petition for a Writ of Certiorari to review the judgment of the District Court and of the Circuit Court of Appeals by virtue of the provisions of 28 U. S. C., Section 347, Subdivision B.

Questions Presented and Reasons Relied on for Allowance of Writ of Certiorari.

The following questions are presented in this case:

1. Can the plaintiff allege a cause of action under Section 405, Title 8, U. S. C. A. on the theory that the certificate of naturalization is illegally procured and attempt to prove and prevail at the time of the trial on the theory of fraud?

2. Can the plaintiff in an action sustain a decree for fraudulently procuring a certificate of naturalization when there is no cause of action alleged in the complaint for fraud?

3. Where all of the jurisdictional elements are present at the time the certificate of naturalization is granted to an alien, and that alien in good faith procured witnesses to corroborate his period of residence, which period of residence has never been in dispute to the present time and has at all times been known to the Government and the Government subsequently discovers that the corroborating witnesses knew the applicant for citizenship approximately five or six months short of the required five year statutory period and other witnesses were present at the time and place of the naturalization proceedings who could have qualified as knowing the applicant for five years and the fact of the applicant's five year residence within the United States never being in dispute, can the Government successfully maintain an action to cancel the certificate of citizenship as having been fraudulently and illegally procured?

The Supreme Court of the United States Should Allow Your Petitioner His Writ of Certiorari in the Above Entitled Proceeding for the Following Reasons.

I.

The principal reason why the Supreme Court should allow your petitioner's petition for a Writ of Certiorari is that the opinion in the instant case, found at page 72 of the transcript of record is in direct conflict with the case of *U. S. v. Rose* cited in 166 Fed. Rep. 999, arising in the Sixth Circuit. The *Rose* case is cited at length in the accompanying brief of petitioner and in order to clarify the law applicable to a situation of these facts, it is incumbent upon this Honorable Court to grant this petition.

II.

The complaint in the instant case is founded primarily on the theory that your petitioner's certificate of citizenship was "illegally procured" within the meaning of that phrase under Section 405 of Title 8, U. S. C. A. At the time of the argument of the appeal before the Honorable Circuit Court, the decision attempted to justify the decree of the trial court on the theory that the certificate was "fraudulently procured" thus depriving your petitioner of any opportunity to introduce or offer any evidence controverting fraud.

III.

The decision of Circuit Court in the instant case holds in effect that a negligent mistake in making a statement

in the "final papers" of an applicant for citizenship is fraud. This holding in and of itself is in direct conflict with previous decisions heretofore rendered in this same Circuit. This Circuit Court held in the case of *U. S. v. Bialoglowski,* 101 Fed. (2d) 928, that where the applicant for citizenship stated that he arrived in the United States on a permanent visa or passport with intention of remaining permanently in the United States, when in fact he entered the United States with only a temporary student's passport good for six months was not a fraudulent statement and his application and certificate of citizenship was not illegally procured. The trial court's opinion of that case is found in 21 Fed. Supp. 613. Both the *Bialoglowski* case and the instant case involve situations indicating an honest and unintentional mistake and in the one case the same Circuit Court holds that such a statement is not fatal and in the other holds that the same is fatal to the validity of the certificate of citizenship.

IV.

This Honorable Supreme Court should grant your petitioner's petition because the opinion of the Honorable Circuit Court in the instant case is not in harmony with any of the decisions of the other Circuits and there is case in point decided by the Supreme Court of the United States. All of the cases touching on facts involved in the instant case are in complete harmony with your petitioner's position. Universally they hold that if a certificate of citizenship is to be cancelled because of being "illegally procured" within the meaning of Title 8, Section

405, U. S. C., the applicant for citizenship must be guilty of "affirmative willful misconduct of a sinister character" (which was admittedly not the case before this court), or conduct by the applicant knowingly false with intention to deceive.

U. S. v. Richmond, 17 Fed. (2d) 28;

U. S. v. Srednick, 19 Fed. (2d) 71;

U. S. v. Rose, 166 Fed. 999;

U. S. v. Bialoglowski, 21 Fed. Supp. 613, 101 Fed. (2d) 928.

Wherefore, your petitioner respectfully prays that a Writ of Certiorari be issued out of and under the seal of the Honorable Court directed to the United States Circuit Court of Appeals for the Ninth Circuit directing that court to certify and send to this Court for its review and determination on a date certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket No. 9371, *Hermann Max Schwinn, Appellant, v. United States of America, Appellee,* and that the judgment of said Court therein be reversed by the Honorable Court and that your petitioner may have such other and further relief in the premises as to this Court may be meet and just.

ANTHONY J. ARMORE,
Counsel for Petitioner.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1940.

No. .....

HERMANN MAX SCHWINN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

I.

Opinion Below.

The opinion of the District Court is not reported. The same is found in the transcript of record commencing on page 56 and ending on page 60. The opinion of the Circuit Court of Appeals for the Ninth Circuit was filed May 10, 1940.

II.

Jurisdiction.

A Petition for Rehearing was filed on June 10, 1940 and the same was denied on June 20, 1940. This Petition for Writ of Certiorari was filed within three months after the filing of the final judgment of the Circuit Court of Appeals.

The jurisdiction of this Court is invoked under Section 240 of the Judicial Code, 28 U.S.C. Section 347.

III.

Statement of the Case.

The essential facts of this action are stated in the accompanying Petition for Writ of Certiorari, and in the interest of brevity are not herein reviewed. Any necessary elaboration will be made in the course of the argument which follows.

IV.

Specification of Errors.

The Circuit Court of Appeals erred in each of the following particulars:

1. In failing to hold that the complaint did not state facts sufficient to constitute a cause of action upon which relief could be granted to the Government.

2. In failing to hold that the facts of the case come squarely within the authority of *United States v. Rose*, at 166 Fed. 999.

3. In failing to hold that the certificate of citizenship of your petitioner was not illegally procured.

4. In failing to hold that your petitioner's certificate of citizenship was not fraudulently procured.

5. In failing to reverse the judgment of the trial court and entering a decree in favor of your petitioner.

6. In failing to hold that the trial court erred in not ruling upon your petitioner's offer of proof contained in the stipulation as to certain facts found on pages 27, 28 and 29 of the transcript of record.

Summary of the Argument.

I.

The complaint upon which the Government seeks relief does not state a cause of action against your petitioner and the facts proved at the trial were not sufficient to constitute a cause of action against your petitioner.

II.

There was no evidence of any kind that your petitioner's certificate of citizenship was illegally procured within the meaning of Section 405, Title 8, U.S.C.A.

III.

There was no evidence of any kind that your petitioner's certificate of naturalization was fraudulently procured within the meaning of Section 405, Title 8, U.S.C.A.

IV.

The complaint purported to allege a cause of action on the theory of "illegally procured" and at the time of trial attempted to recover on the theory of "fraud".

V.

That the findings of fact were not supported by the evidence in that the findings of fact should have found that your petitioner was actually entitled to become a citizen at the time he received his certificate of naturalization on July 22, 1932.

VI.

That the trial court erred in refusing to rule on your petitioner's offer to introduce evidence at the time of the trial of this action to prove that all of the jurisdictional facts actually were in existence at the time the certificate of naturalization was granted and that there were available witnesses with personal knowledge of your petitioner's residence at the time of the hearing on the petition for naturalization at the trial of the above entitled action.

ARGUMENT.

POINT I.

The Complaint Upon Which the Government Seeks Relief Does Not State a Cause of Action Against Your Petitioner and the Facts Proved at the Trial Were Not Sufficient to Constitute a Cause of Action Against Your Petitioner.

The undisputed facts stipulated to by both parties in this action and the facts interpreted most favorably for the appellee makes it incumbent for this court to enter a decree in favor of your petitioner and one that reverses the decree of the trial court.

The complaint does not allege and the evidence did not prove that your petitioner had not in fact continuously resided in the United States for the full five year period and in the County of Los Angeles, State of California, for one year immediately prior to the filing of his petition for citizenship, or that the petitioner was not in fact entitled to be admitted as a citizen.

There is no allegation in the complaint and there is no evidence in the record that your petitioner's witnesses, or either of them, who subscribed to your petitioner's petition for citizenship, intentionally or knowingly testified falsely, or that this petitioner procured them to testify falsely, or that he even knew that they did not have personal knowledge of his residence in the United States and in the County of Los Angeles, State of California, for the requisite time.

The facts stipulated to in this action conceded that the petitioner at the time he landed in the United States entered the United States lawfully. Your petitioner filed his declaration of intention to become a citizen on the 22nd day of April, 1925, in Stark County, State of Ohio. On April 13, 1932, the petitioner petitioned the United States District Court at Los Angeles, California, for a certificate of naturalization, and on July 22, 1932, the certificate of citizenship under number 3578891 was issued to your petitioner.

The petitioner had two witnesses who subscribed to the petition for citizenship who alleged that they had known him for five years and knew him to be a resident of the County of Los Angeles, State of California, for more than one year immediately prior to the petitioner's filing of his petition for citizenship.

The two witnesses actually believed that they had known your petitioner and your petitioner believed that he had known the witnesses for the full five-year period and did not discover this mistake until some time during the summer of 1938. However, had it been called to your petitioner's attention on April 13 or July 22, 1932, two other witnesses could and would have been produced who had known the petitioner to have resided in the United States for the period of five years and within the County of Los Angeles, State of California, for a period of one year, all immediately preceding the filing of his petition for citizenship, and who would have testified to that effect.

In other words, the petitioner and his two witnesses were unintentionally mistaken as to their acquaintance for the required five-year statutory period they had known each other by a matter of a few months.

The evidence in this case conclusively proves that the petitioner was entitled, in fact, to his certificate of citizenship.

The existence of the fact that the petitioner had resided within the United States five years and the County of Los Angles, State of California, for one year, all continously and immediately prior to the filing of his petition for citizenship, is in no manner challenged or disputed.

In the opinion of the petitioner this action comes squarely in the authority of the case of *U. S. v. Rose.* We quote the following from that case:

> "The bill does not allege that defendant had not in effect continuously resided in the United States or some territory thereof for the full period of five years, and within the State of Iowa for one year, immediately prior to the filing of his petition, or that defendant was not in fact entitled to be admitted as a citizen; nor is it alleged that the petition for naturalization, including the affidavits attached thereto, upon its face does not fully comply with the requirements of the Naturalization Act, or was in any manner insufficient to authorize the District Court of Osceola County to admit the defendant as a citizen, if its allegations should be proved to the satisfaction of the court upon the final hearing as required by the act. The petition must therefore be presumed to be sufficient to authorize the court to act thereon; and the only allegation assailing the judgment is that the witnesses named, who made affidavits to the petition and testified upon the final hearing, did not have personal

knowledge of the defendant's residence in the United States and in the State of Iowa for the requisite time to authorize him to be admitted as a naturalized citizen of the United States. But there is no allegation that the witnesses, or either of them intentionally or knowingly testified falsely in either instance, or that he even knew that they did not have personal knowledge of his residence in the State of Iowa for the requisite time. . . . It would be an unsafe rule to establish that the judgments of court of general jurisdiction, regular upon their face, could be set aside and declared void upon the bare allegation or proof that an affiant who verified the petition upon which the judgment is founded, when verification is necessary, or a witness who testified upon the hearing, should mistakenly or unintentionally state in his affidavit or testimony that he had 'personal knowledge' of an existing fact necessary to be stated to warrant the judgment, though he did not have such knowledge, *when the existence of the fact is in no manner challenged or disputed,* and may have been satisfactorily proven to the court by other competent evidence upon the trial or hearing. . . ." (Italics ours.)

U. S. v. Rose, 166 Fed. 999.

Upon the foregoing authority it must be held that it was incumbent upon the plaintiff to allege and prove that the petitioner, in fact, had not resided in the United States for the required statutory period, when that was not the fact.

The complaint fails to allege any of said facts and the evidence fails to establish any thereof.

Therefore, the petitioner is entitled to a dismissal of the complaint herein.

POINT II.

There Was No Evidence of Any Kind That Your Petitioner's Certificate of Citizenship Was Illegally Procured Within the Meaning of Section 405, Title 8, U.S.C.A.

(1) Petitioner's Certificate of Naturalization Was Not Fraudulently or Illegally Procured.

The complaint avers that the certificate of naturalization was fraudulently and illegally procured, but does not allege or prove the fact on which that conclusion is based. We quote from *U. S. v. Rose:*

> "The averment that the judgment 'was fraudulently and illegally procured' is a mere conclusion, and of no avail unless the facts alleged show that defendant so procured the same; and the second paragraph of the bill as above set out must be limited to, and controlled by, the facts stated in paragraph 3.
>
> "The bill does not allege that defendant had not in fact continuously resided in the United States or some territory thereof for the full period of five years, and within the State of Iowa for one year, immediately prior to the filing of his petition, or that defendant was not in fact entitled to be admitted as a citizen; nor is it alleged that the petition for naturalization, including the affidavits attached thereto, upon its face, does not fully comply with the requirements of the Naturalization Act, or was in any manner insufficient to authorize the District Court of Osceola County to admit the defendant as a citizen, if its allegations should be proved to the satisfaction of the court upon the final hearing as required by the act. The petition must therefore be presumed to be sufficient to authorize the court to act thereon; and the

only allegation assailing the judgment is that the witnesses named, who made affidavits to the petition and testified upon the final hearing, did not have personal knowledge of the defendant's residence in the United States and in the State of Iowa for the requisite time to authorize him to be admitted as a naturalized citizen of the United States. But there is no allegation that the witnesses, or either of them, intentionally or knowingly testified falsely in either instance, or that the defendant procured them to so testify, or that he even knew that they did not have personal knowledge of his residence in the United States and the State of Iowa for the requisite time. . . ."

U. S. v. Rose, 166 Fed. 999.

(2) There Is No Proof of Facts That Petitioner's Certificate of Citizenship Was Illegally Procured and the Evidence Does Not Sustain the Finding of Fact in That Particular and Neither Is the Judgment Sustained by the Law.

(a) The most that can be said for plaintiff's case is that the petitioner at the time he filed his petition for citizenship made an unintentional mistake.

These facts do not bring the instant case within the meaning of "illegally procured", as used in Title 8, Section 405, U. S. C. A.

> "The term 'illegally procured' connotes *affirmative, willful* misconduct on the part of the holder of a certificate of citizenship or those acting for him to impose on the court, or to induce governmental agents to act in a manner not authorized by law." (Italics ours.)
>
> *U. S. v. Bialoglowski,* 21 Fed. Supp. 613; affirmed on appeal, Ninth Circuit, Feb. 23, 1939.

Citing these:

U. S. v. Richmond, 17 Fed. (2d) 28;

U. S. v. Lenore, 207 Fed. 865.

The courts have even gone so far as to hold that mere errors in law are not within the definition of "illegally procured".

U. S. v. Lenore, 207 Fed. 865.

(b) The underlying primary question herein involved is whether the remedy of cancellation here sought could be availed of under the Fifteenth Section of the Act of June, 1906. We submit that it could not and quote as follows from the case of *U. S. v. Srednick,* 19 Fed. (2d) 71:

> "Was the certificate, in the words of the act, 'illegally procured.' In the case of U. S. v. Richmond, 17 Fed. (2d) 28, we hold that to the words 'procured', 'illegally procured', coupled in this statute with fraud, as it is, must be attributed the purpose of Congress to use those words in their commonly-understood meaning, as evidencing a positive, affirmative act on the part of the procurer, and one of a sinister character. No such accusation is involved in the present case."

U. S. v. Srednick, 19 Fed. (2d) 71.

(c) As previously stated, the evidence does not show that the defendant and petitioner wilfully or intentionally committed a misdeed, but, to the contrary, the proof is, and the court in its opinion positively found and believed that the error was purely unintentional and the result of an honest mistake.

"That the defendant and each of his two witnesses who filed affidavits and testified for the defendant, actually believed when so testifying that each of the witnesses had known the defendant to have resided in the County of Los Angeles, and State of California for five years preceding the time of the giving of such testimony."

Oral Opinion of Trial Court.

It has been held that the unintentional mistake of a person seeking citizenship with regards to the statement of his marital status is not grounds for canceling a certificate of citizenship for fraud or illegal procurement.

U. S. v. Petrucci, 23 Fed. Supp. 687.

In the opinion of at least one Federal judge it appears to be a common mistake for witnesses in good faith to swear they have known a petitioner the required five years and later ascertained that fact to be incorrect

"Every District Court has repeatedly had the experience in naturalization proceedings of finding that a witness in good faith has made an affidavit of the period of time that he has known the petitioner and then, upon investigation prior to or at the time of the hearing, discovered that a mistake has been made and that his acquaintanceship with the petitioner does not quite cover the full statutory requirements. We have repeatedly, in the administration of a naturalization, permitted the procurement of another witness to supplement the proof already available. I see no reason why this phase of the statute dealing with the qualifications and requisites of the supporting witnesses should not be construed with that elasticity which would permit the correction of honest errors

and avoid the hardships resulting from a dismissal of the petition or holding that it is no petition at all. No practical purpose has been advanced which would be served by such a construction."

In re Tartaglione, 8 Fed. Supp. 212.

There has never been any contention by the Government that the defendant and petitioner did not have the prescribed qualifications for citizenship in fact.

"The granting of the order (certificate of naturalization) established the status of the defendant as a citizen of the United States, *and that status can only be destroyed by proof that the prescribed qualifications for citizenship did not exist in fact.*" (Italics ours.)

U. S. v. Marini, 16 Fed. Supp. 963.

(a) In every case in which a certificate of citizenship has been cancelled by a proceeding under Section 405 of Title 8, U. S. C. A., the qualifications for citizenship did not exist in fact; and in every case brought under this section *where the qualifications for citizenship did exist in fact the court refused to cancel the certificate of citizenship.*

We quote from the case of *U. S. v. Richmond,* 17 Fed. (2d) 28, 29:

"It is clear that under such statute the Government can in a case within the purview of the act have such cumulative remedy, and such relief has been had where, as in U. S. v. Ness, 245 U. S. 320, 38 S. Ct.

118, 62 L. Ed. 321, the applicant did not, on entering the country, register as required by statute and where he did not accompany his application for naturalization with a certificate of registration; so also where, as in the case of Ginsbury v. U. S., 243 U. S. 273, 27 S. Ct. 422, 61 L. Ed. 853, the applicant had never appeared in court and no court has taken action upon his case; and likewise where, as in the case of Johannsen v. U. S., 225 U. S. 232, 32 S. Ct. 613, 56 L. Ed. 1066, the applicant had not been five years in the country. In each instance it will thus appear the certificate was illegally procured, for in two cases the applicants had perpetrated a fraud upon the court, and in the other no court ever convened or considered the applicant's case *and in all cases the applicants were not qualified to become citizens.*" (Italics ours.)

U. S. v. Richmond, 17 Fed. (2d) 28, 29.

(b) In all fairness to the Government's case it is incumbent upon petitioner to discuss the facts on which the trial court inferred fraud.

In the trial court's opinion it inferred fraud from the following:

(1) "The appellant spoke fluent English when he arrived."

(2) "The appellant was able to deal with the public without handicap."

(3) "He was thoroughly proficient with figures."

From the foregoing the trial court inferred that the petitioner could not have made an unintentional mistake and therefore the petitioner was guilty of fraud in stating he knew the witnesses for five years prior to the filing of the petition for citizenship.

The petition for writ of certiorari should be granted likewise on the grounds that there was no evidence that your petitioner's certificate of citizenship was "illegally procured" within the meaning of Title 8, Section 405, U. S. C. A.

From the foregoing points and authorities it is apparent that your petitioner's writ of certiorari should be granted for the reason that the complaint does not allege a cause of action on the theory of fraud and the complaint does not allege a cause of action for relief for petitioner's certificate of naturalization being illegally procured.

Likewise, your petitioner's petition should be granted for the reason that there is no evidence in the record adduced at the time of trial to prove that your petitioner's petition was illegally procured or through fraud within the meaning of the foregoing authorities.

POINT III.

There Was No Evidence of Any Kind That Your Petitioner's Certificate of Naturalization Was Fraudulently Procured Within the Meaning of Section 405, Title 8, U.S.C.A.

(1) This Action Is a Statutoy Proceeding, Which Required the Appellee to Prove That This Petitioner's Certificate of Naturalization Was Procured by Fraud, or That It Was Illegally Procured.

(a) "Section 405. It shall be the duty of the United States District Attorneys for the respective districts, or the Commissioner or the Deputy Commissioner of Naturalization, upon affidavit showing good cause therefor, to institute proceedings in any court having jurisdiction to naturalize aliens in the judicial district in which the naturalized citizen may reside at the time of bringing this suit for the purpose of setting aside and cancelling the certificate of citizenship on the ground of fraud, or on the ground that such certificate of citizenship was illegally procured . . ." (U. S. C. A., Title 8, Section 405.)

(b) Paragraph V of the complaint reads as follows:

"Plaintiff alleges that the naturalization of the said Hermann Max Schwinn was illegally procured in violation of the second and fourth subdivisions of Section 4 of the Act of June 29, 1906 (34 Stat. 596), as amended by the Act of March 2, 1929 (45 Stat. 1513; U. S. C. A., Title 8, Secs. 379 and 382), in that:

(a) His allegations in said petition and testimony given during said examination concerning the period of his county residence were false;

(b) Said petition was not verified by witnesses or depositions of persons having personal knowledge of his residence and character in the United States by law."

(c) Paragraph VIII of the complaint reads as follows:

"That, by reason of the matters hereinabove set forth, the said certificate of citizenship No. 3578891 is subject to cancellation as fraudulently and illegally procured, under the provisions of Section 15 of the Naturalization Act of June 29, 1906 as amended."

(2) The Evidence That Was Developed and the Stipulation as to Certain Facts Do Not Prove Fraud.

(a) Paragraph VII of the stipulation as to certain facts reads as follows:

"That defendant, if called to the witness stand and duly sworn, would testify on oath that at the time he signed and swore to his petition for naturalization (described in the complaint as a petition for citizenship) No. 37218 in this court on April 13, 1932, he believed that he had been a continuous resident of the County of Los Angeles, State of California, for in excess of five years; that he would further testify that when he procured the affidavits and testimony of the witnesses Gerhard Foerstel and George Ernest Martens in support of his petition for naturalization he believed that he had known said witnesses and believed that they had known him for a period in excess of five years immediately preceding the 13th day of April, 1932."

The petitioner, at the time of the trial of this action, did take the witness stand and testified to the same effect as is contained in this stipulation.

(b) Paragraph VIII of the stipulation as to certain facts reads as follows:

> "That witness Gerhard Foerstel, if called to the witness stand and sworn as a witness, would testify under oath that he is one of the witnesses who subscribed to an affidavit in behalf and testified as a witness in support of defendant's petition for naturalization; that at the time of subscribing to such affidavit and of giving such testimony he was acquainted with the defendant and that he, at that time, believed that his acquaintance with the defendant and with the defendant's period of residence in the County of Los Angeles, State of California, was in excess of five years continously prior to April 13, 1932."

(c) Paragraph IX of the stipulation as to certain facts reads as follows:

> "That witness George Ernest Martens, if called to the witness stand and sworn as a witness, would testify under oath that he is one of the witnesses who subscribed to an affidavit in behalf and testified as a witness in support of defendant's petition for naturalization; that at the time of subscribing to such affidavit and of giving such testimony, he was acquainted with the defendant and that he, at that time, believed that his acquaintance with the defendant and with the defendant's period of residence in the County of Los Angeles, State of California, was in excess of five years continuously prior to April 13, 1932."

Furthermore, the evidence presented to the trial court confirms the petitioner's theory of defense and does not in any particular support any proof of fraud. We call the Court's attention to transcript page 49:

> "Q. Do you recall, in substance, what was said at the time Mr. Foerstel and Mr. Martens signed your

> Application for Naturalization—as witnesses—or when you first talked to them about it? A. I do not remember the details but I know that we all believed that we had known each other for five years and the facts as to whether both of these witnesses were available at that time to go down to court with me."

And also to transcript page 51:

> "Q. We are not asking you to remember the exact conversation but just your best recollection of the substance of it. Was the matter as to how long they had known you discussed before you came down to file this Petition? A. It probably was.
>
> Q. Well, was it? A. Well, it must have been because I would not have asked these witnesses unless it was definite that they had known me and each other for five years."

The petition for Writ of Certiorari should be granted likewise on the grounds that there was no evidence that your petitioner's certificate of citizenship was "fraudulently procured" within the meaning of Title 8, Section 405, U. S. C. A.

From the foregoing points and authorities it is apparent that your petitioner's Writ of Certiorari should be granted for the reason that the complaint does not allege a cause of action on the theory of fraud and the complaint does not allege a cause of action for relief for petitioner's certificate of naturalization being illegally procured.

Likewise, your petitioner's petition should be granted for the reason that there is no evidence in the record adduced at the time of trial to prove that your petitioner's petition was illegally procured or through fraud within the meaning of the foregoing authorities.

POINT IV.

The Complaint Purported to Allege a Cause of Action on the Theory of "Illegally Procured" and at the Time of Trial Attempted to Recover on the Theory of "Fraud".

In reading the opinion of the Circuit Court of Appeals the petitioner, for the very first time since the inception of this action, learns that the Government bases its cause of action and claims for relief on the theory of fraud. Petitioner throughout the entire proceedings, has relied upon the presumption and theory that the plaintiff sought relief not on the theory of fraud, but on the theory that petitioner's certificate was illegally procured.

The naturalization statutes permit a certificate of naturalization to be cancelled for one of two reasons and for no other reasons. The certificate may be cancelled by (1) if the certificate was fraudulently obtained; or (2) if the certificate was illegally procured.

U. S. C. A., Title 8, Section 405.

These grounds are by no means synonymous. Illegally procured is specifically defined as one thing.

U. S. v. Bialoglowski, 21 Fed. Supp. 613, 101 Fed. (2d) 928;

U. S. v. Richmond, 17 Fed. (2d) 28;

U. S. v. Srednick, 19 Fed. (2d) 71.

Fraud has been defined as something quite different.

U. S. v. Rose, 166 Fed. 999.

At this late date the petitioner is now faced with the necessity of appealing from the trial court's judgment in

which the pleadings purport to state cause of action on one theory and the appellee seeks to justify that complaint as being sufficient and claiming the facts proving the grounds for relief on an entirely different theory from that alleged in the complaint on which this action was tried.

The only conclusion to which the Supreme Court of the United States could arrive is to determine and decide that the complaint on which this action was based does not in any particular state a cause of action for fraud.

The only place in the entire complaint where the word fraud appears is found in paragraph VIII of the complaint.

This paragraph reads as follows:

> "That by reason of the matters hereinabove set forth, the said certificate of citizenship No. 3578891 is subject to cancellation as fraudulently and illegally procured, under the provisions of Section 15 of the Naturalization Act of June 29, 1906, as amended."

The only charging portion of the entire complaint is found in paragraph V of the complaint. This paragraph charged that the naturalization was illegally procured for two reasons: (a) his allegations in said petition and testimony given during said examination concerning the period of his county residence were false; (b) said petition was not verified by witnesses nor depositions of persons having personal knowledge of the residence and character in the United States as prescribed by law.

Very obviously the statements of (a) and (b) above do not by the wildest stretch of the imagination allege acts constituting fraud. At no other place in the entire complaint is there any illusion in the remotest sense of the

word to a fact or statement or condition purporting to show fraud.

The bare allegations that a thing was fraudulently done, without specifying what the actual acts of fraud were, do not present an issuable fact and is nothing more nor less than a conclusion of the pleader and of no probative value whatsoever.

Sella v. Brown, 144 Fed. 742.

The court has held that allegations to the effect that an agreement was obtained by fraudulent means and devices, without stating what these particular acts were, constituted nothing more nor less than a conclusion of the pleader and must be entirely disregarded.

Church v. Swetland, 243 Fed. 289.

The court, in the case of *Dominic v. Havemeyer,* quotes from the case of *Chamberlain v. U. S.*, cited in 270 U. S. page 347, as follows:

> "The petition sought to recover on the original complaint. It alleged broadly that this settlement was inquisitous and unjust and not the voluntary act of the petitioner, but was secured by 'fraud' of the officers of the War Department in the handling of the claim by continued brow-beating, and by coercion through which they 'literally forced' the petitioner to take the sum offered.
>
> "The general allegations of 'fraud' and coercion were mere conclusions of the pleader; and were not admitted by the demurrer. Fogg v. Blair, 139 U. S. 118, 127.
>
> "To show the cause of action it was necessary that the petition state distinctly the particular acts of fraud and coercion relied on, specifying by whom and in what manner they were perpetrated, with

such definitions and reasonable certainty that the court might see that, if proved, they would warrant the setting aside of the settlement."

Dominic v. Havemeyer, 49 Fed. (2d) 849.

With regard to the sufficiency of the allegations of fraud, the court's attention is called to the case of *U. S. v. Caster.* This is a case in which the allegations in the complaint on fraud for obtaining Indian patents were set out more in detail than even in the instant case. The court held as follows:

"It has been stated by the Supreme Court of the United States that when fraud and misrepresentation are relied upon as grounds of interference by the court, they should be stated with such fullness and particularity as to show that they must necessarily have effected the actions of the officers of the department. Mere allegations of fraud and misrepresentation will not suffice. Citing Quinby v. Lovlan, 104 U. S. 420."

U. S. v. Caster, 271 Fed. 615.

See, also:

Bessick v. Dorries, 174 Fed. 502;

Van Norst v. American Hop & Barley, 177 Fed. 976.

The petitioner wishes to call the court's attention especially to a case brought under the same section of the United States Code that this action is, and the question of the sufficiency of the allegations of fraud is raised in that action as an issue is raised in the instant case. In the case of *U. S. v. Rochteschell,* involving an action to cancel the certificate of naturalization on the grounds of fraud due to the fact that the naturalized citizen was a sailor and absent from the United States for a very large

portion of the five-year period required for residence. The court held that the plaintiff must state particular fraudulent acts justifying the cancellation and the same could not be charged in general terms. The court stated as follows, approving *In re Schnieder,* 164 Fed. 335, and *U. S. v. Carlini,* 199 Fed. 857:

> "This we believe to be a correct interpretation both of the new law and of Section 2170 of the Revised Statutes. To establish a residence there must doubtless be a concurrence of act and intent; but, where once established, temporary absences from time to time, unaccompanied by an intent to abandon or change the residence, do not operate to interrupt the continuity thereof. There is nothing in the naturalization act, other than the phrase itself, 'has resided continuously within the United States', to indicate a purpose upon the part of Congress to require continuous physical presence, and in the practical administration of the law such a construction would entail consequences harsh in the extreme. Within reasonable limits, therefore, it is a question of fact, to be determined in the light of all the attendant circumstances of each particular case, whether the continuity of residence has been broken by temporary absences.
>
> "The said order and certificate of citizenship was procured from said court upon the representation that said respondent had resided within the United States for the continued term of at least five years immediately preceding the date of his application for citizenship in said court as aforesaid, and continuously since prior to his arriving at the age of eighteen years; whereas in truth and in fact respondent had not resided continuously in the United States for five years, nor continuously since prior to his arriving at the age of eighteen years, but had resided in the

United States at the times and in the manner as set forth in the affidavit attached to his petition, and marked 'Exhibit A', which is hereby referred to and made a part hereof.

"But this general averment, involving, as it does, possible inference of law as well as general conclusions of fact, is insufficient as a charge of perjured testimony or of other fraud. To be sufficient, the petition must, in harmony with the general rule of pleading fraud, point out specifically in what particular respect the representations were false. This the petition failed to do."

U. S. v. Rochetschell, 208 Fed. 530.

For the first time in the history of this case the Government comes out squarely in the Circuit Court of Appeals and informs your petitioner that it was relying on the theory of fraud to cancel the certificate of naturalization.

By no stretch of the imagination can it be said that it is equitable and fair for the Government to try this action in the trial court under its pleading on the "possible" theory that the certificate of naturalization was illegally procured and on appeal try to substantiate the trial court's decree on the theory of fraud.

Obviously, your petitioner was not given an opportunity to meet the issue of fraud and if this case were sent back to the trial court for trial, your petitioner herein could produce ample evidence that would establish beyond any question of a doubt that no taint of fraud could be attributed to the conduct of your petitioner.

Your petitioner's petition should be granted likewise for the reason set forth that no fraud was pleaded or proved in this case and the certificate of naturalization was not illegally procured within the meaning of the citation heretofore made.

POINT V.

That the Findings of Fact Were Not Supported by the Evidence in That the Findings of Fact Should Have Found That Your Petitioner Was Actually Entitled to Become a Citizen at the Time He Received His Certificate of Naturalization on July 22, 1932.

The trial court in its oral opinion states that there was no fraud committed by the petitioner or by his subscribing witnesses at the time the petitioner petitioned the United States District Court for his certification of naturalization.

(a) The court, in delivering its oral opinion from the bench, believed that the mistake made by the petitioner and his witnesses was an unintentional mistake.

(b) We quote the following from the oral opinion of the trial court at the time of the trial:

> "The points developed by stipulation of fact and the pleadings is this: that, under that section there is a cause of action properly stated by the Government:
>
> "(a) As a matter of fact, at the time of filing the petition for citizenship and at the time of hearing thereon, the defendant had actually been a *bona fide* resident of and within the continental boundaries of the United States for a period in excess of five years immediately preceding the filing of the petition and being a resident of the County of Los Angeles, State of California, for the continuous period of one year immediately preceding the filing of the petition.
>
> "(b) That the defendant and each of his two witnesses who filed affidavits and testified for the defendant, actually believed when so testifying that each

of the witnesses had known the defendant to have resided in the County of Los Angeles and State of California for five years immediately preceding the time of the giving of such testimony."

Oral Opinion of Trial Court.

All of the prescribed qualifications for this petitioner to be admitted as a citizen existed in fact at the time this petitioner filed his petition for citizenship on April 13, 1932, and was granted a certificate of naturalization on July 23, 1932.

(a) The facts alleged in the complaint and the facts stipulated to in the stipulation as to certain facts stated all of the required facts necessary for a certificate of naturalization to be in existence, actually, at the time the petition for citizenship was filed and the certificate of naturalization granted.

(b) This petitioner entered the United States lawfully and registered on arrival. He filed his first papers or declaration of intention properly. Within the proper time he filed his petition for citizenship. When this petitioner filed his petition for citizenship he had actually and continuously resided in the United States for five years immediately prior to the filing of such petition and he had actually resided in the County of Los Angeles, State of California, for one year immediately prior thereto. The petition for citizenship filed by this petitioner on April 13, 1932, was regular upon its face in all particulars.

(c) The only objection that could be found to the entire proceeding of this petitioner from December 26,

1924, the date this petitioner entered the United States, to July 23, 1932, the date his certificate of naturalization was granted, was ascertained some six years thereafter and that was merely an irregularity as to the length of time the two subscribing witnesses had known the petitioner. This was an unintentional mistake of but a few months. Irrespective of the two witnesses actually subscribing to the petition for citizenship, had the petitioner known of this discrepancy at the time (April 13, 1932, or July 23, 1932), the date he filed his petition for citizenship and the date his certificate of naturalization was granted, he could have provided the Government with two other witnesses who actually had known this appellant in the United States and in the County of Los Angeles for the entire five years.

The fact, itself, that the petitioner had actually and *bona fidely* resided in the United States continuously for five years and in the County of Los Angeles, State of California, for one year immediately prior to April 13, 1932, has never been in dispute and has at all times been stipulated.

Paragraph I of the stipulation as to certain facts reads as follows:

> "That on the 13th day of April, 1932, defendant had been a resident of and within the continental boundaries of the United States of America for a continuous period in excess of five years."

From the foregoing facts it is apparent that there was no fraud in this case and that the certificate of naturalization was not illegally procured. The most that can be said for the evidence, and the very premise upon which the trial court rendered its opinion, is that it proves conclusively that the petitioner and his witnesses did nothing more than make an unintentional mistake of his personal knowledge of an existing fact, when the existence of that fact has never been challenged or disputed, and it is a mistake which is common to naturalization proceedings, the correction of which has been permitted by the substitution of other witnesses and has been repeatedly permitted in the administration of the naturalization proceedings themselves.

In re Tartaglione, 8 Fed. Supp. 212.

POINT VI.

That the Trial Court Erred in Refusing to Rule on Your Petitioner's Offer to Introduce Evidence at the Time of the Trial of This Action to Prove That All of the Jurisdictional Facts Actually Were in Existence at the Time the Certificate of Naturalization Was Granted and That There Were Available Witnesses With Personal Knowledge of Your Petitioner's Residence at the Time of the Hearing on the Petition for Naturalization at the Trial of the Above Entitled Action.

In the opinion of counsel for your petitioner, it is seriously urged that this point alone is sufficient to grant the hearing of this petition and the reversal of the trial court's decree.

The trial court, by failing to rule on this evidence, by the very issues involved, fails to reconcile the facts pertaining to this case with the law. The very basis upon which the decree in this action could be cancelled is within the equity jurisdiction of this court.

In the stipulation as to certain facts arrived at by the counsel for the parties to this action, it is stipulated as follows:

> "That witness Gerhard Foerstel, if called to the witness stand and sworn as a witness, would testify under oath that he is one of the witnesses who subscribed to an affidavit in behalf and testified as a witness in support of defendant's Petition for Naturalization; that at the time of subscribing to

such affidavit and of giving such testimony he was acquainted with the defendant and that he, at that time, believed that his acquaintance with the defendant and with the defendant's period of residence in the County of Los Angeles, State of California, was in excess of five years continuously prior to April 13, 1932.

"That witness George Ernest Martens, if called to the witness stand and sworn as a witness, would testify under oath that he is one of the witnesses who subscribed to an affidavit in behalf and testified as a witness in support of defendant's Petition for Naturalization; that at the time of giving such testimony, he was acquainted with the defendant and that he, at that time, believed that his acquaintance with the defendant and with the defendant's period of residence in the County of Los Angeles, State of California was in excess of five years continuously prior to April 13, 1932."

At the time of the trial, counsel for the Government objected to the materiality of the facts included within this stipulation and the court made the following observation:

"The Court: Wouldn't it be satisfactory to counsel for the Government and for the defendant if we reserve ruling or action on this matter until later?

"Under the existing circumstances, it does not seem relevant, but under the new rules it might turn out to be of some importance. Suppose that we reserve the ruling on that?

"Mr. Lambeau: That is satisfactory to the Government.

"Mr. Sheffield: That is perfectly satisfactory with the defendant, Your Honor.

"The Court: Very well, we will reserve ruling on that at this time."

This question goes to the essence of the Government's case and the very materiality of the Government's claim that your petitioner's certificate of naturalization was illegally and fraudulently procured. In other words, the witnesses available under the stipulation as to certain facts, beyond any peradventure of a doubt establish that there was no fraud committed by your petitioner in the instant case.

How can it possibly be conceivable that your petitioner would fraudulently supply two witnesses to corroborate his residence for five years in the United States if he knew at the time that these witnesses had not known him for the full five-year period and had two witnesses in the jurisdiction where he secured his certificate of citizenship who had known him for the full five-year period when that period of residence is taken into consideration with the fact that the two witnesses offered at the time of trial had known him from the time he first arrived in the United States. In other words, is it reasonable to assume that your petitioner would use two witnesses to establish the five years residence required unless he was convinced to a moral certainty that these witnesses had known him when there were other witnesses available who knew your petitioner in Akron, Ohio, as well as in California. The position that the Government takes in this case is all out of reason with the facts.

Your petitioner used as witnesses Gerard Foerstel and George Ernest Martens to establish his five-year residence in the United States (which period of residence has never been in dispute). At that time he actually had available witnesses at Los Angeles, California, who knew your petitioner in Akron, Ohio, where your petitioner lived before

he came to Los Angeles, California. With these witnesses available, it is ridiculous for the Government to argue that your petitioner fraudulently imposed upon the Government two witnesses knowing that these two witnesses were incompetent to testify as to your petitioner's five-year period of residence in the United States (which five-year period has never been in dispute).

Your petitioner respectfully requests that the decree of the trial court be reversed and an order made holding that your petitioner's certificate of citizenship and naturalization is valid and in full force and effect because:

The complaint upon which the Government seeks relief does not state a cause of action against your petitioner and the facts proved at the trial were not sufficient to constitute a cause of action against your petitioner.

There was no evidence of any kind that your petitioner's certificate of citizenship was illegally procured within the meaning of Section 405, Title 8, U.S.C.A.

There was no evidence of any kind that your petitioner's certificate of naturalization was fraudulently procured within the meaning of Section 405, Title 8, U.S.C.A.

The complaint purported to allege a cause of action on the theory of "illegally procured" and at the time of trial attempted to recover on the theory of "fraud".

That the findings of fact were not supported by the evidence in that the findings of fact should have found that your petitioner was actually entitled to become a citizen at the time he received his certificate of naturalization on July 22, 1932.

That the trial court erred in refusing to rule on your petitioner's offer to introduce evidence at the time of the

trial of this action to prove that all of the jurisdictional facts actually were in existence at the time the certificate of naturalization was granted and that there were available witnesses with personal knowledge of your petitioner's residence at the time of the hearing on the petition for naturalization at the trial of the above entitled action.

In conclusion it is respectfully submitted that this Court should issue its Writ of Certiorari, to the United States Circuit Court of Appeals in this action.

August, 1940.

ANTHONY J. ARMORE,
Counsel for Petitioner.

WILBUR V. KEEGAN,
Of Counsel.